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Attorneys for Defendant, MEMBER SOURCE MEDIA, LLC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ASIS INTERNET SERVICES, a California corporation,

Plaintiff,

vs.

MEMBER SOURCE MEDIA, LLC, a California limited liability company, dba **PREMIUM PERKS** (aka **PREMIUMPERKS.COM**), also dba **ONLINE REWARD GROUP** (aka **ONLINERewardGroup.COM**), also dba **GREAT AMERICAN GIVEAWAYS** (aka **GREATAMERICANGiveaways.COM**), also dba **CONSUMER GAIN** (aka **CONSUMERGAIN.COM**), and **DOES ONE** through **FIFTY**, inclusive

Defendants.

Case No. CV-08-1321 EMC

**MEMBER SOURCE MEDIA, LLC'S
ANSWER TO ASIS INTERNET
SERVICES' COMPLAINT FOR
DAMAGES AND INJUNCTIVE
RELIEF – VIOLATION OF CAN-
SPAM ACT OF 2003 [15 U.S.C.
§7701, et seq.] AND CALIFORNIA
BUSINESS & PROFESSIONS CODE
§17529.5; MEMBER SOURCE
MEDIA, LLC'S AFFIRMATIVE
DEFENSES**

Defendant, Member Source Media, LLC. ("Member Source" or "Defendant"), by and through its counsel, Kronenberger Burgoyne, LLP, for itself and no other party, as and for its Answer to Plaintiff ASIS Internet Services' ("Plaintiff" or "Asis") Complaint

1 (“Complaint”), denies each and every allegation not specifically addressed herein,
2 including Plaintiff’s introductory Paragraph, and admits, avers and denies as follows:

3 **JURISDICTION AND VENUE**

4 1. To the extent that the allegations contained in Paragraph 1 of the
5 Complaint call for a conclusion of law, no response is required. To the extent that a
6 response is required, Member Source denies same.

7 2. To the extent that the allegations contained in Paragraph 2 of the
8 Complaint call for a conclusion of law, no response is required. Member Source denies
9 that it maintains an office at 1322 Maple Street. Member Source denies the allegation in
10 Paragraph 2 that “the other dba’s named in this suit are copyrighted brand names
11 owned by MEMBER SOURCE MEDIA, LLC.” Member Source denies knowledge or
12 information sufficient to form a belief as to the truth of the remaining allegations in
13 Paragraph 2, and on that basis, denies the same.

14 3. To the extent that the allegations contained in Paragraph 3 of the
15 Complaint call for a conclusion of law, no response is required. Member Source denies
16 knowledge or information sufficient to form a belief as to the truth of the remaining
17 allegations in Paragraph 3, and on that basis, denies the same.

18 **FACTUAL ALLEGATIONS**

19 4. Member Source admits that it is a California limited liability company.
20 Member Source admits that it provides Internet marketing services in the United States
21 and California. Member Source denies the remaining allegations in Paragraph 4.

22 5. Member Source denies the allegations in Paragraph 5.

23 6. To the extent that the allegations contained in Paragraph 6 of the
24 Complaint call for a conclusion of law, no response is required. Member Source denies
25 the allegations contained in Paragraph 6.

26 7. To the extent that the allegations contained in Paragraph 7 of the
27 Complaint call for a conclusion of law, no response is required. To the extent that a
28 response is required, Member Source denies same.

8. To the extent that the allegations contained in Paragraph 8 of the Complaint call for a conclusion of law, no response is required. Member Source denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and on that basis, denies the same.

9. Member Source denies the allegations in Paragraph 9 of the Complaint.

10. Member Source denies the allegation in Paragraph 10 of the Complaint, which states: "Plaintiff received Defendant's emails and Plaintiff has suffered adverse affect [sic] from the sending and receipt of Defendant's emails." Member Source denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 10, and on that basis, denies the same.

11. Member Source denies the allegations contained in Paragraph 11.

12. Member Source denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12, and on that basis, denies the same.

13. Member Source denies the allegations contained in Paragraph 13.

14. Member Source denies the allegations contained in Paragraph 14.

15. Member Source denies the allegations contained in Paragraph 15.

16. Member Source denies the allegations contained in Paragraph 16.

FIRST CAUSE OF ACTION

17. In response to Paragraph 17 of the Complaint, Member Source incorporates its responses to Paragraphs 1 through 16, inclusive, with the same force and effect as if fully set forth herein.

18. Member Source denies the allegations contained in Paragraph 18.

19. To the extent that the allegations contained in Paragraph 19 of the Complaint call for a conclusion of law, no response is required. Member Source denies the allegation in Paragraph 19 that states: "all of the relevant electronic mails sent by or on behalf of Defendants on March 3, 2006, through January 21, 2008, contained or were accompanied by header information that was materially false or materially misleading."

1 Member Source denies knowledge or information sufficient to form a belief as to the
2 truth of the remaining allegations in Paragraph 19, and on that basis, denies the same.

3 20. To the extent that the allegations contained in Paragraph 20 of the
4 Complaint call for a conclusion of law, no response is required. Member Source denies
5 knowledge or information sufficient to form a belief as to the truth of the remaining
6 allegations in Paragraph 20, and on that basis, denies the same.

7 21. To the extent that the allegations contained in Paragraph 21 of the
8 Complaint call for a conclusion of law, no response is required. Member Source admits
9 that its business model relies on email and Web-based advertisements. Member Source
10 denies the allegation in Paragraph 21 that states:

11 Defendants sent or had sent 5006 separate items of electronic mail to Plaintiff's
12 computers that include advertisements with a subject line that a person would
13 know would be likely to mislead a recipient, acting reasonably under the
14 circumstances, about a material fact regarding the contents and subject matter of
15 the message.

16 Member Source denies knowledge or information sufficient to form a belief as to the
17 truth of the remaining allegations in Paragraph 21, and on that basis, denies the same.

18 22. To the extent that the allegations contained in Paragraph 22 of the
19 Complaint call for a conclusion of law, no response is required. Member Source denies
20 knowledge or information sufficient to form a belief as to the truth of the remaining
21 allegations in Paragraph 22, and on that basis, denies the same.

22 23. Member Source admits that it uses the following marks/websites in its
23 business: PREMIUM PERKS/PREMIUMPERKS.COM, ONLINE REWARD
24 GROUP/ONLINERewardGROUP.COM, FREE
25 RETAILREWARDS/FREERETAILREWARDS.COM, GREAT AMERICAN
26 GIVEAWAYS/GREATAMERICANGIVEAWAYS.COM, CONSUMER
27 GAIN/CONSUMERGAIN.COM. Member Source denies knowledge or information
28

1 sufficient to form a belief as to the truth of the remaining allegations in Paragraph 23,
2 and on that basis, denies the same.

3 24. Member Source denies knowledge or information sufficient to form a belief
4 as to the truth of the allegations in Paragraph 24, and on that basis, denies the same.

5 25. To the extent that the allegations contained in Paragraph 25 of the
6 Complaint call for a conclusion of law, no response is required. To the extent that a
7 response is required, Member Source denies same.

8 26. To the extent that the allegations contained in Paragraph 26 of the
9 Complaint call for a conclusion of law, no response is required. To the extent that a
10 response is required, Member Source denies same.

11 27. To the extent that the allegations contained in Paragraph 27 of the
12 Complaint call for a conclusion of law, no response is required. To the extent that a
13 response is required, Member Source denies same.

14 28. To the extent that the allegations contained in Paragraph 28 of the
15 Complaint call for a conclusion of law, no response is required. To the extent that a
16 response is required, Member Source denies same.

17 29. To the extent that the allegations contained in Paragraph 29 of the
18 Complaint call for a conclusion of law, no response is required. To the extent that a
19 response is required, Member Source denies same.

20 30. To the extent that the allegations contained in Paragraph 30 of the
21 Complaint call for a conclusion of law, no response is required. To the extent that a
22 response is required, Member Source denies same.

23 **SECOND CAUSE OF ACTION**

24 31. In response to Paragraph 31 of the Complaint, Member Source
25 incorporates its responses to Paragraphs 1 through 30, inclusive, with the same force
26 and effect as if fully set forth herein.

1 32. To the extent that the allegations contained in Paragraph 32 of the
2 Complaint call for a conclusion of law, no response is required. Member Source denies
3 the allegation in Paragraph 32 that states:

4 All of the relevant electronic mail advertisements sent by or on behalf of the
5 Defendants on March 3, 2006, through January 21, 2008, contained or were
6 accompanied by header information that was materially false or materially
7 misleading.

8 Member Source denies knowledge or information sufficient to form a belief as to the
9 truth of the remaining allegations in Paragraph 32, and on that basis, denies the same.

10 33. Member Source denies knowledge or information sufficient to form a belief
11 as to the truth of the remaining allegations in Paragraph 33, and on that basis, denies
12 the same.

13 34. To the extent that the allegations contained in Paragraph 34 of the
14 Complaint call for a conclusion of law, no response is required. To the extent that a
15 response is required, Member Source denies same.

16 35. To the extent that the allegations contained in Paragraph 35 of the
17 Complaint call for a conclusion of law, no response is required. Member Source denies
18 the allegation in Paragraph 35 that states:

19 The Defendants sent 5006 separate unsolicited electronic mail advertisements to
20 plaintiff's computers that include various subject lines that were false and
21 misleading and would be likely to mislead a recipient, acting reasonably under the
22 circumstances, about a material fact regarding the contents or subject matter of
23 the message in violation of California Business and Professions Code §
24 17529.5(a)(3).

25 Member Source denies knowledge or information sufficient to form a belief as to the
26 truth of the remaining allegations in Paragraph 35, and on that basis, denies the same.
27
28

1 36. To the extent that the allegations contained in Paragraph 36 of the
2 Complaint call for a conclusion of law, no response is required. To the extent that a
3 response is required, Member Source denies same.

4 37. To the extent that the allegations contained in Paragraph 37 of the
5 Complaint call for a conclusion of law, no response is required. To the extent that a
6 response is required, Member Source denies same.

7 8 **AFFIRMATIVE DEFENSES**

9 Member Source sets forth below its affirmative defenses. Each defense is
10 asserted as to all causes of action unless otherwise noted. By setting forth these
11 affirmative defenses, Member Source does not assume the burden of proving any fact,
12 issue, or element of a cause of action where such burden properly belongs to Plaintiff.
13 Moreover, nothing stated herein is intended or shall be construed as an
14 acknowledgement that any particular issue or subject matter is relevant to Plaintiff's
15 allegations.

16 **FIRST AFFIRMATIVE DEFENSE**

17 As Member Source's First Affirmative Defense, Member Source asserts that
18 Plaintiff has failed to state a cause of action upon which relief may be granted. Plaintiff
19 has failed to plead the prima facie elements of its asserted causes of action.

20 **SECOND AFFIRMATIVE DEFENSE**

21 As Member Source's Second Affirmative Defense, Member Source asserts that
22 Plaintiff's claims are barred, in whole or in part, because Plaintiff knowingly assumed the
23 risks it now complains of.

24 On information and belief, Plaintiff accessed customer accounts, reconfigured its
25 filtering service and servers, collected emails sent to former customers, and sent these
26 emails to its attorneys and third parties, all for the sole purpose of pursuing litigation and
27 recovering statutory damages.
28

1 On information and belief, Plaintiff was aware of all of the consequences it now
2 complains of well before the receipt of the alleged emails, and actually hoped to receive
3 the alleged emails. Moreover, had Plaintiff not knowingly taken the affirmative efforts
4 described above, it would not have received the alleged emails.

6 **THIRD AFFIRMATIVE DEFENSE**

7 As Member Source's Third Affirmative Defense, Member Source asserts that
8 Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands and
9 Plaintiff should be estopped from bringing this lawsuit.

10 Plaintiff has intentionally and with forethought engaged in a scheme to extort
11 money from Member Source through the use of the CAN-SPAM Act of 2003 and
12 California Business and Professions Code §17529.5.

13 On information and belief, Plaintiff has engaged in unlawful and criminal conduct
14 to maintain this lawsuit against Member Source, including but not limited, to accessing
15 former customers' email accounts without their consent.

16 Plaintiff has admitted that it has intentionally taken affirmative steps to cause the
17 alleged misconduct and to incur the alleged harm.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 As Member Source's Fourth Affirmative Defense, Member Source asserts that
21 any recovery herein by Plaintiff is barred by the doctrine of in pari delicto, because
22 Plaintiff bears fault for the damages it suffered.

24 **FIFTH AFFIRMATIVE DEFENSE**

25 As Member Source's Fifth Affirmative Defense, Member Source asserts that
26 Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to use ordinary
27 care and diligence to take all necessary steps to mitigate and minimize any damages
28 Plaintiff claims to have sustained and for which it seeks recovery in this action.

SIXTH AFFIRMATIVE DEFENSE

As Member Source's Sixth Affirmative Defense, Member Source asserts that if Plaintiff has sustained any injuries or incurred any adverse effect or losses, such adverse effect or losses, if any, were the result of intervening or superseding events, factors, occurrences, or conditions, which were in no way caused by Member Source and for which Member Source is not liable.

SEVENTH AFFIRMATIVE DEFENSE

As Member Source's Seventh Affirmative Defense, Member Source asserts that any loss, injury or damage incurred by Plaintiff was proximately caused by the acts of third parties or non-parties whom Member Source neither controlled nor had the right to control.

EIGHTH AFFIRMATIVE DEFENSE

As Member Source's Eighth Affirmative Defense, Member Source asserts that damages, if any, were proximately caused by Plaintiff and, therefore, require an allocation of fault.

NINTH AFFIRMATIVE DEFENSE

As Member Source's Ninth Affirmative Defense, Member Source asserts that Plaintiff invited and consented to the acts of Member Source alleged in the Complaint.

On information and belief, but for Plaintiff's actions undertaken for the sole purpose of bringing this lawsuit, it would not have received the alleged emails at issue. Plaintiff took specific and concrete steps to receive and collect the alleged emails with the sole purpose of brining a lawsuit for statutory damages.

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TENTH AFFIRMATIVE DEFENSE

As Member Source's Tenth Affirmative Defense, Member Source asserts that Plaintiff's alleged incidents of loss and damage were intentionally caused by, or with knowledge and consent of Plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

As Member Source's Eleventh Affirmative Defense, Member Source asserts that Plaintiff waived any claim or cause of action against Member Source for the acts alleged in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

As Member Source's Twelfth Affirmative Defense, Member Source asserts that Plaintiff's claims are barred in whole, or in part, under the doctrine of pre-emption.

THIRTEENTH AFFIRMATIVE DEFENSE

As Member Source's Thirteenth Affirmative Defense, Member Source asserts that Plaintiff's action is barred by the principles of res judicata. Many of the issues relevant to this case have been already adjudicated against ASIS by Judge Spero in the case, *ASIS v. Optin Global, et. al.*, No. C-05-5124.

FOURTEENTH AFFIRMATIVE DEFENSE

As Member Source's Fourteenth Affirmative Defense, Member Source asserts that Plaintiff's action is barred by the principles of collateral estoppel. Many of the issues relevant to this case have been already adjudicated against ASIS by Judge Spero in the case, *ASIS v. Optin Global, et. al.*, No. C-05-5124.

ADDITIONAL AFFIRMATIVE DEFENSES

Member Source hereby gives notice that it intends to rely on any additional

Attorneys for Defendant,
MEMBER SOURCE MEDIA, LLC.